IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

GIFT TAX REFERENCE No 6 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF GIFT TAX

Versus

NANDKISHORE SAKARLAL (INDL)

Appearance:

1. GIFT TAX REFERENCE No. 6 of 1988
MR TANVISH BHATT FOR MR. M.R. BHATT, Standing Counsel for the Revenue
MR H.M. TALATI, Advocate for the Assessee

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE K.M.MEHTA

Date of decision: 03/05/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. The Income Tax Appellate Tribunal, Ahmedabad Bench "A" has referred the following question of law for the opinion of this Court under Section 26 of the Gift Tax Act, 1958 :

"Whether in law on facts, the assessee is liable to pay tax under the Gift-tax Act, 1958 on account of the variations made on 31-12-1970 in the settlement deed of 1961?"

2. The assessee - H.U.F. filed gift tax return on 30th November 1971 showing value of taxable gift of Rs. Nil for the year relevant to the Assessment Year 1971-72. On the fresh assessment which was done pursuant to the appellate orders, the Gift Tax Officer held by his order dated 30th March 1982 that, on exercising the power of revocation under clause (15) of the trust deed dated 11-4-1961, that earlier deed ceased to exist in law and a new trust came into existence by virtue of the deed dated 31st December 1970 and therefore, the assessee was liable to pay gift tax in respect of the property transferred for which the trust was created under each of the trust deeds. The Commissioner upheld the orders of the G.T.O.

3. When the matter was carried to the Tribunal, in the Revenue Appeal Nos. 930 to 933 / AHD / 1986, from which the present reference arises, two Members of the Bench differed and their opinions were referred to a third member, who expressed the view that the assessee was not liable to pay gift tax in respect of the declaration made on 31st December 1970.

3.1 In his opinion rendered by the Judicial Member, it was held that the trust created under the deed dated 11-4-1961, which was initially irrevocable, became revocable at the end of six years and one day. On 31-12-1970, the settler did not revoke the entire trust but only substituted clause 2(b) and clause (3) thereof and revoked clause (15) under which the trust was earlier revocable at the end of the said period. The learned Judicial Member observed that the settler had parted with the property under the settlement deed dated 11-4-1961 which did not revert to him and the same trustees continued to be the legal owners of the trust property. Moreover, the subsequent deed dated 31-12-1970 was executed on a stamp paper of only Rs.100 and not on the basis of the valuation of the entire property, as was done in the earlier deed dated 11-4-1961.

3.2 The Accountant Member, in his differing opinion, held that the property transferred under the settlement deed dated 11-4-1961 and under the deed dated 31-12-1970, was different. According to him, "What was transferred originally was right to receive income for specified period for which value is to be determined under Section 6(2) and not under Section 6(1) read with Rule 11 of the Gift-tax Rules". It was held that when the deed dated 31-12-1970 was executed, the original trust had already become imperfect because of power of revocation or power to change the class of beneficiaries of income and / or corpus etc. reviving on expiry of the period of six years and one day from the date of the initial deed. Without considering the ratio of the decision of the Supreme Court in Allahabad Bank Ltd. v. C.I.T., reported in 24 ITR 519 (SC), the learned member seems to have relied on it. In the said decision, it was held that, in view of the uncertainty as regards the beneficiaries and absence of any obligation to grant any pension, no legal and effective trust could be said to have been created. That decision was rendered in context of the provisions of the Income Tax Act. The Accountant Member held that the view taken by C.G.T. (Appeals) that there was a fresh gift on the basis of transfer of property with totality of interests in shares covering successive interest was correct and that was required to be valued under Section 6(1).

3.3 After the differing opinion of the Accountant Member was rendered on 9th May 1985, somewhat surprisingly, the Judicial Member, as if making a rejoinder, made certain observations by stating; "With reference to the note dated 9th May 1985 recorded by my learned Brother, I have to state as follows".

3.4 The case was referred by the President of the Appellate Tribunal to another Member, who was a Judicial Member and who rendered his opinion on 13th March 1986, agreeing with the conclusions reached in the opinion of the Judicial Member holding that the assessee was not liable to gift tax in respect of the declaration made in December 1970.

4. The learned counsel for the Revenue contended before us that, for all intent and purposes, a new trust was created under the deed dated 31st December 1970. He submitted that the increase in beneficiaries in some of the deeds, as also making the shares of the beneficiaries definite in all the deeds, amounted to creation of new trusts. He submitted that the original trust was

revocable while and under the new trust, the property was ultimately to be vested in the beneficiaries after a period of fifteen years, and the trust was now made irrevocable. Such drastic changes in the settlement brought about a totally new set up.

4.1 In support of his contention, the learned counsel relied upon the decision of this Court in Anarkali Sarabhai v. Commissioner of Gift-Tax, reported in 259 ITR 97, in which, in context of the fact that, by exercising the power of appointment, no corpus of the trust fund was transferred but only the right of Anarkali Sarabhai to receive the trust funds came to be transferred by her in favour of the four trusts of which she was the settler, it was held that there was no question of any gift having been made by Anarkali of the corpus of trust and therefore, the Tribunal was right in holding that the Gift-Tax Officer was not justified in levying gift-tax on the value of the entire corpus since it was actually the assessee's interest in the property which was transferred.

4.2 The learned counsel also relied upon the decision of the Madhya Pradesh High Court in Princess Usha Trust v. Commissioner of Income Tax, M.P., reported in 144 ITR 808, in which it was held that, under Section 77 of the Indian Trusts Act, a trust is extinguished when the fulfillment of its purpose became impossible by destruction of the trust property or otherwise, and that the expression "otherwise" would cover a case where the trust property is not available for fulfillment of its purpose, because, all the beneficiaries under a trust have validly transferred their interest. According to him, the interest of the beneficiaries under the trust deed of 11-4-1961 stood transferred by virtue of the subsequent deed dated 31-12-1970 in favour of the beneficiaries in whom the property was to vest after a period of fifteen years and by virtue of the trust having now been made irrevocable.

4.3 The learned counsel also referred to the decision of the Supreme Court in Thakur Raghunath Ji Maharaj v. Ramesh Chandra, reported in AIR 2001 SC 2340, in which, from the terms contained in the deed, it was held that the gift was not absolute and / or unconditional. The Court held that the gift deed and the agreement forming one transaction were to be read together and given effect to accordingly, and since the defendants did not construct a college building on the suit land, the gift did not come in to effect.

5. The learned counsel appearing for the assessee argued that the property vested in the trustees under the deed dated 11-4-1961 and it continued to vest in the trustees even after the expiry of the period of six years and one day, during which the trust was irrevocable. Even when changes were effected by substituting clause 2(b) and clause (3) of the original trust deed on 31st December 1970, the legal ownership of the property continued with the same trustees. It was submitted that gift tax was paid on the basis of valuation of the entire property when the property was transferred in the names of the trustees under the settlement deed dated 11-4-1961. According to him, mere change in the manner in which the trustees were to manage the property in context of the beneficiaries and specifications of the shares of the beneficiaries did not have the effect of divesting the ownership of the property which had continued to vest in the trustees. He submitted that change in the beneficiaries in some of these settlements did not create any transfer of property, because, the transfer was by virtue of creating a trust itself which was already created under the deed dated 11-4-1961. It was also submitted that, by making the trust irrevocable also, no transfer took place and no new trust was created.

6. The learned counsel for both the sides have referred, from the original record transmitted to this Court, the settlement deed dated 11-4-1961 (N.Sakarlal Settlement) and the Deed dated 31-12-1970 in respect of the same settlement (N. Sakarlal Settlement) by which the changes were effected. It is submitted that the other deeds and changes are similar in cases of all the settlements.

6.1 In the N. Sakarlal Settlement, the settlement deed dated 11-4-1961, it has been mentioned in the initial recital, after naming the five trustees, that the trustees had agreed to be the first trustees, all being parties to and executing the said deed. It is also mentioned therein that "for purposes of stamp duty, the said property is taken to be of the present market value of Rs.1,80,400-00 only".

6.2 By clause (1) of the settlement deed dated 11-4-1961, the property described in Schedule "A" of the deed was transferred by the settler to the trustee with all his rights, title and interest and handed over and delivered to the trustees in the following terms:

"NOW THIS INDENTURE WITNESSETH as follows :-

1. In consideration of the premises and of the natural love and affection the Settlor bears towards the members of his family and for diverse other good causes and considerations him thereunto moving, he the Settlor doth hereby transfer and assign unto the Trustees of those property described in the Schedule `A' hereto AND all his right title and interest thereto and hereby hands over and delivers to the Trustees the Certificates of Shares with Transfer Deeds duly executed TO HAVE, HOLD, RECEIVE AND TAKE the same into the Trustees upon the trusts and with and subject to powers, provisions agreement and declarations hereinafter appearing and contained of and concerning the same." (emphasis added).

6.3 In clause (2) of the said deed, it has been recorded that the trustees had received and taken delivery of the said property with transfer deeds duly executed. The trustees agreed to hold and possess the property described in Schedule "A" upon trust stipulating to recover the dividends, interest and income out of the trust fund and to pay out of the same, charges for collecting including expenses of staff salaries, rent, conveyance car expenses, legal charges and all other out-going, taxes etc. pertaining to the maintenance thereof.

6.4 Thereafter, comes clause 2(b) which was later substituted. The said clause, as it stood prior to its substitution, reads as under :

"2. xxx xxx xxx xxx xxx

(a) xxx xxx xxx xxx xxx

(b) To apply the balance of such dividends, interest and income hereinafter called "the net income" or such portion thereof as the Trustees in their absolute discretion deem proper for the maintenance, education, advancement in life and otherwise for the benefit of

(1) Ben Chandravati Sakarlal
(2) Ben Malvika Sakarlal and
(3) Shri Harsh Navnitlal and

their heirs and/or assigns in such shares and proportions and in such manner in all

respects as the Trustees in their absolute discretion deem fit AND to accumulate the balance of net income and to add the same to the corpus AND IT IS HEREBY EXPRESSLY AGREED AND DECLARED that any act bonafide done by the Trustees or any payment bonafide made by the Trustees or the decision of the Trustees in respect of the amount to be spent or applied in pursuance of the provisions of this clause shall be final and binding on all persons claiming under these presents and shall not be questioned in any Court and shall not be questioned in any Court."

It will be seen from this clause that the trust was discretionary trust and the beneficiaries' shares were not specified. The deed specifies the powers and duties of the trustees in detail and thereafter reserves the power of revocation, in clause (15), which is reproduced hereunder:

"15. These presents shall remain irrevocable for a period of six

15. These presents shall remain irrevocable for a period of six years and one day from the day hereof. After the expiration of the said period it shall be lawful for the Settler at any time or times by any deed or deeds for the Settler at any time or times by any deed or deeds revocable or irrevocable inter vivos or by his last will or codicil thereto to alter, vary or absolutely to revoke all or any of the uses trusts powers provisions and limitations herein declared and contained of and concerning the Trust Fund as provided and appointed herein and if he so desires in lieu of the uses, trusts and limitations so revoked to limit, declare and appoint by the same or any other deed or deeds or will or codicil, such new or other uses trusts powers provisions and limitations of and concerning the Trust Fund or the income thereof of the management thereof as he the Settler shall think proper anything hereinbefore contained to the contrary notwithstanding and upon such revocation the said Trust Fund or any part thereof or the income thereof or any part thereof in respect of which such power or revocation shall be exercised shall belong absolutely to the

Settler subject to any such new limitations declarations or appointment."

Under the said clause (15), the settlement was irrevocable for a period of six years and one day and admittedly, even after that period, the settlement was not revoked or altered till the deed 31-12-1970 was executed by the settler and signed by all the trustees. By that deed, sub-clause (b) of clause (2) and clause (3) of the Deed of Trust dated 11-4-1961 were substituted and clause (15) thereof came to be revoked.

6.5 In the deed dated 31-12-1970 invoking the powers reserved with the settler under clause (15) of the Trust Deed dated 11-4-1961, the settler, "desirous of altering or varying the trusts, powers and provisions contained in sub-clause (b) of clause (2) and clause (3) of the said recited Deed of Trust dated 11-4-1961 and also to revoke clause (15) of the said recited deed dated 11th day of April 1961 and to make the trust irrevocable", executed the said deed.

6.6 The settler, by the subsequent deed, revoked and made void the provisions contained in sub-clause (b) of clause (2) and the whole of clause (3) of the Deed of Trust dated 11th April 1961 and in lieu thereof, he declared and appointed trust, powers and provisions in the following sub-clause (b) of clause (2) :

"2(b). From the 1st day of April 1970 upto the 31st day of March, 1985, to divide the balance of such dividends, interest and income after providing for all outgoings (hereinafter called `the net income) amongst (1) Ben Chandravali Sakarlal (2) Ben Malvika Sakarlal (3) Shri Harshbhai Navnitlal in proportion of 50%, 20% and 30% respectively, PROVIDED FURTHER that in the event of the death of any of them the said Ben Chandravali Sakarlal, Ben Malvika Sakarlal & Harsh Navnitlal before the 31st day of March 1985 the income coming to the share of such deceased person shall be divided equally amongst the legal heirs of such deceased person."

6.7 Similarly, the original clause (3) of the Deed of Trust was substituted by the following clause (3) :

"3. On the 1st day of April 1985, to pay, transfer and hand over the Trust Fund

together with the accumulation of income, if any, the Trustees shall pay transfer and hand over the Trust Fund together with accumulations of income if any to wife and children of the said Nandkishore Sakarlal in equal shares absolutely."

6.8 Furthermore, by the said subsequent deed of 31-12-1970, the settler revoked the earlier clause (15) and made the trust irrevocable. It was, in terms, stated at the end that, save as altered and varied by this document dated 31-12-1970, all other trusts, powers provisions, covenant and conditions contained in the said Deed of Trust dated the 11th day of April 1961 shall remain in full force and effect". This subsequent deed was signed by the settler in the presence of two witnesses and even the trustees had put their signatures in the presence of two witnesses.

7. There is some difference between the definition of "gift" in section 2(xii) of the Gift-tax Act, 1958 and section 122 of the Transfer of Property Act. These provisions are re-produced hereunder for a ready comparison along with definitions of "transfer of property" as appearing in section 2(xxiv) of the Gift-tax Act and section 5 of the Transfer of Property Act, again for a ready comparison because of the difference in the two definitions, which has a bearing on the meaning of the word "gift" in these two Acts :

Gift-tax Act, 1958 :

"2. In this Act, unless the context otherwise requires,--

xxx xxx xxx

xxx xxx xxx

(xii) "gift" means the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money's worth, and includes the transfer or conversion of any property referred to in section 4, deemed to be a gift under that section.

xxx xxx xxx

(xxxiv) "transfer of property" means any

disposition, conveyance, assignment, settlement, delivery, payment or other alienation of property and, without limiting the generality of the foregoing, includes --

(a) the creation of a trust in property;

(b) the grant or creation of any lease, mortgage, charge, easement, licence, power, partnership or interest in property;

xxx xxx xxx

Transfer of Property Act, 1882 :

"5. "Transfer of property" defined.--

In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons; and "to transfer property" is to perform such act.

In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals."

122. "Gift" defined.-- "Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee and accepted by or on behalf of the donee.

Acceptance when to be made.-- Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void."

7.1 In the Gift-tax Act, the word "donee" is defined in clause 2(viii) so as to mean any person who acquires any property under a gift, and where a gift is made to a trustee for the benefit of another person includes both the trustee and the beneficiary. Under the definition of the word "gift" in section 122 of the Transfer of Property Act, a person accepting the gift is called the donee, as mentioned therein.

8. The meaning of the word "gift" under the Gift-tax Act is significantly different from its meaning under the Transfer of Property Act. The essentials of a gift for the purposes of the Gift-tax Act are : (i) there must be a voluntary transfer of property within the meaning of section 2(xxiv) by one person to another, and, (ii) such transfer should be without consideration in money or money's worth. The essential difference that widens the scope of "gift" for the purposes of the provisions of the Gift-tax Act, is due to the enlarged meaning of the expression "transfer of property" in Section 2(xxiv). The expression "transfer of property" as defined in clause (xxiv) of section 2 of the Gift-tax Act means any disposition, conveyance, assignment, settlement, delivery, payment or other alienation of property and, inter alia, includes "the creation of a trust in property". Thus, whenever a trust is created in the property that would be a transfer by the settler to another person of the trust property and being without consideration in money or moneys worth, it would be a gift under Section 2(xii) of the Gift-Tax Act even if it may not satisfy the narrower and traditional concept of a gift as reflected in Section 122 of the Transfer of Property Act, which means, a transfer of property without consideration to the donee and accepted by or on behalf of the donee. In that definition, the meaning of "gift" is governed by the meaning of "transfer of property", which, as defined in Section 5 of the Transfer of Property Act, inter alia, means, an act by which a living person conveys property, in present or in future, to one or more other living persons, as defined. A transfer of property is either a transfer of absolute ownership or a transfer of one or more of subordinate rights or interest in the property.

9. A gift may be made by the equitable machinery of a trust and the trust is perfected when the settler either constitutes himself as a trustee or transfers the trust property to the trustees. This is clear from the provisions of section 6 of the Indian Trusts Act, 1882 which provides that a trust is created when the author of

the trust indicates with reasonable certainty by any words or act, (a) an intention on his part to create thereby a trust, (b) the purpose of the trust, (c) the beneficiary, and (d) the trust property and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust property to the trustee.

9.1 The gift of a moveable property is made by effecting the transfer by delivery. In the present case, the trust property which was specified in Schedule "A" to the Deed of Trust dated 11-4-1961. Though the trust was irrevocable for six years and one day, as mentioned in that Deed, it continued to exist even thereafter and was not revoked. The Deed of 31-12-1970 had the effect of merely substituting sub-clause (b) of clause (2) and clause (3) and making the Deed irrevocable. Admittedly, creation of the trust itself by the Deed of 11-4-1961 which would be transfer of property within the extended meaning of the phrase as per section 2(xxiv) of the Gift-Tax Act and the property that was transferred to the trustees never reverted to the settler, because, that part of the trust deed continued to operate. There was no fresh trust created nor was the property again transferred in the name of the trustees. The trustees remained the same. Even if the trustees had changed, that property would have vested by operation of law to the new trustees by virtue of the provisions of Section 75 of the Indian Trusts Act, which provides that, whenever any new trustee is appointed under Section 73 or Section 74, all the trust property for the time being vested in the surviving or continuing trustees or trustee, or in the legal representative of any trustee, shall become vested in such new trustee, either solely or jointly with the surviving or continuing trustees or trustee, as the case may require. Thus, even though the trust could have been revoked after six years and one day, being the period for which it was irrevocable, in view of the power reserved by the settler in clause (15) of the Trust Deed, it was not, in fact, revoked and the same trust that was created by clause (1) of the Trust deed continued with the same trustees who all through out remained the legal owners of the properties that were transferred to them for the benefit of the cestui que trust. Admittedly, the gift tax was paid by the donor / settler on the valuation of the entire trust property that was transferred under the respective Trust Deeds to the name of the trustees.

10. It was argued that the trust became revocable after six years and one day and therefore, the gift stood

revoked and fresh gift was made to the beneficiaries by directing the property to absolutely vest in them after fifteen years and making the trust irrevocable. It was also pointed out that a revocable gift was void under Section 126 of the Transfer of Property Act.

10.1 The concept of a gift being void when the donor and donee have agreed that it can be revoked as incorporated in Section 126 of the Transfer of Property Act is altogether different from the concept of revocation of trust as per the power retained by the settler in the Deed of Settlement, as envisaged by Section 77(d) of the Indian Trusts Act, 1882, which, inter alia, provides that, a trust is extinguished when the trust, being revocable, is expressly revoked. There was no express revocation of the trust created under the Trust Deed dated 11-4-1961 nor any resumption of the title to the property which was transferred to the trustees for perfecting the trust under the said Deed of 11-4-1961.

10.2 In a living trust, the properties are transferred by the settler to the trustee and the trust comes into existence after it is so funded. The trustee controls and manages the trust property and is responsible for the safe keeping of the trust property. Since the trust is created and operative while the settler is still alive, it is also called living trust which is essentially the same as other trusts. The settler who creates the trust by the Deed of Trust incorporates in it the details for the management and disposition of the property contributed to the trust. When power to alter such details is retained by the settler, he can revise those instructions. But when the trust is perfected by property being already transferred from the settler to the trustee, that position would continue even in a revocable trust until reversed or changed by the settler. Thus, by mere change in the manner of disposition of the trust property, without affecting the creation of the trust and the transfer of trust property which was already effected in the name of the trustees, the trust itself cannot be said to be revoked or the property that was transferred to the trustees cannot be said to have been reverted to the settler by virtue of such changes in the subordinate clauses having bearing on the disposition of the trust property which continued to vest in the trustees. There was, therefore, no revocation of the trust that was created by the Trust Deed dated 11-4-1961 and since the entire property continued to vest in the same trustees even after the changes were effected in clauses 2(b), and, (3) of the original Trust Deed by

substituting the new clauses, which had a bearing only on the question as to how the property that already vested in the trustees should be dealt with for the benefit of the cestui que trust, there was no fresh gift made by the Deed of 31-12-1970 and the gift already made by transferring trust property to the trustees when the trust was created on 11-4-1961 and when the gift-tax was paid on the entire value of that property, was never revoked since the trust created and perfected under that deed was not at all disturbed by the changed effected on 31-12-1970.

11. Under Section 6(2) of the Gift-tax Act, dealing with the topic of determination of value of gifts, it is provided that, where a person makes a gift which is not revocable for a specified period, the value of the property gifted shall be the capitalised value (as per Rule 11) of the income from the property gifted during the period for which the gift is not revocable. This provision has a bearing on the question of valuation of the property gifted. In the present case, when the Trust Deed was executed, the valuation was not, admittedly, determined on the basis of section 6(2), but as submitted by the learned counsel for both sides, the gift-tax was paid on the entire valuation of the property which was transferred to the trustees for the benefit of the cestui que trust. Even if, by subsequent change in the clauses 2(b) and (3) and making of the trust irrevocable, any question had arisen having any impact on the question of valuation of the property and if the gift-tax were not paid on the entire value of the property, then in such an event, at best, it would have been a case of escapement of the gift tax payable on the entire value of the gift by the assessee settler. Therefore, the provision of section 6(2) which was referred to on behalf of the Revenue can have no bearing on the facts of the present case.

12. We, therefore, hold that the majority view of the Tribunal that there was no fresh gift by variation made on 31-12-1970 and therefore, the assessee was not liable to pay any gift tax on account of such variation is correct. The question referred to us is, therefore, answered in the negative in favour of the assessee and against the Revenue. The Reference stands disposed of accordingly with no order as to costs.

13. Before we part with the matter, we are constrained to deal with one delicate aspect of the powers of the Members of the Bench, who differ in their opinions and the manner in which they ought to conduct

themselves. In the present case, when the appeals were initially heard by the two Hon'ble Members of the Tribunal, as noted above, the Judicial Member gave his opinion holding that this was not a case of gift when variation by the Deed dated 31-12-1970 was made in the original Trust Deed. The Accountant Member, thereafter, recorded his dissent on 9-5-1985, which he was entitled to, giving reasons for his opinion, which was to the effect that there was a transfer of totality of interest in the property by the subsequent deed of 31-12-1970, and that was different from what was done earlier. It is thereafter that, before the matter could be referred to the third member, in view of the difference of opinion on the points on which they differed, the Judicial Member made certain remarks in writing on 22-5-1985 by referring to the opinion of the Accountant Member dated 9-5-1985". The matter was referred by the President to the third Member of the Tribunal, who rendered his opinion 13.3.1986, on the points on which the two members had differed on, and in conformity with the majority view, the appeals were allowed on 27-8-1986 by the original Members of the Bench. On that very day, after the appeals were allowed, the Accountant Member, referring to the remarks which were made on 22-5-1985 by the Judicial Member after the differing opinion was rendered by the Accountant Member, observed to the effect that the second order passed by the learned Judicial Member was not warranted and tried to justify as to why the general question was referred. This order virtually is a rejoinder to what was stated by the Judicial Member in his order of 22-5-1985 which itself was also uncalled for.

13.1 Under Section 23(11) of the Gift-tax Act, 1958, it has been provided that the provisions of sub-sections (1), (4) and (5) of Section 255 of the Income-Tax Act shall apply to the Appellate Tribunal in the discharge of its functions under that Act. Sub-section (4) of section 255 of the Income-Tax Act, 1961, which is relevant for the purpose, provides that, if the members of a Bench differ in their opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President of the Appellate Tribunal for hearing on such point or points by one or more of the other members of the Appellate Tribunal, and such point or points shall be be decided according to the opinion of the majority of the members of the Appellate Tribunal, who have heard the case, including those who first heard it.

12.2 Every Member of a Bench of a Judicial Tribunal is entitled to form his opinion. Judicial propriety demands that the Members of the Bench respect each others right to hold one's own opinion. This is why, when there is difference of opinion amongst the Members of the Bench who are equally divided, the points on which they differ are required to be referred by the President of the Tribunal to one or more other Members, as per the provision of sub-section (4) of Section 255 of the Income Tax Act, which was invoked in the present case by virtue of the provisions of sub-section (11) of section 23 of the Gift-tax Act. When there is difference of opinion, the points on which the Members have differed, are referred to the third Member for opinion and the majority view prevails. There is no process of making any comment on any of the opinions rendered by the differing members by such members, contemplated under the said provisions and indeed, such a course can lead to ugly and acrimonious exchanges, vitiating the atmosphere of comity and brotherhood amongst the Honourable Members of the Bench of the Tribunal and would be highly improper and not befitting the high dignitaries entrusted with the sobre task of decision-making process by law.

12.3 We, therefore, disapprove the manner in which, after the differing opinions were expressed, comments were darted at each other by the differing Members and hope that the Members respect each others' right to express their opinions, leaving it to the Member to whom the disputed points are referred by the President to render his opinion and let the provisions of section 255(4) operate smoothly without such unbecoming and self-created clogs.

[R.K.ABICHANDANI, J.] [K.M. MEHTA, J.]
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